Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CHARLES SULLIVAN D/B/A
SULLIVAN MACHINE & TOOL COMPANY,

Petitioner,

versus

MAZAK CORPORATION,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did Congress create an implied private right of action or remedy in Title III, Part I, Section 304(a) of the Tariff Act of 1930, Chapter 497, 46 Stat. 590, 687, as amended in the Customs Administrative Act of 1938, Chapter 679, Section 3, 52 Stat. 1077, 1078, 19 U.S.C. § 1304(a), in favor of the ultimate purchaser of an article of foreign origin imported into the United States which was not marked in such a manner as to indicate to the ultimate purchaser the English name of the country of origin of the article, in violation of 19 U.S.C. § 1304(a), if the ultimate purchaser did not want and would not have purchased the article if it had been marked in the manner required by the statute?

STATEMENT OF PARTIES

The caption of the Petition for Writ of Certiorari contains the names of all of the parties in Sullivan's appeal in the Supreme Court of Alabama.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Charles Sullivan d/b/a Sullivan Machine & Tool Company (hereinafter referred to as "Sullivan") petitions this Court for a Writ of Certiorari to review the decision in this civil action rendered by the Supreme Court of Alabama.

THE OPINION AND ORDER OF THE SUPREME COURT OF ALABAMA AND THE ORDER OF THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

The Supreme Court of Alabama's "No Opinion" affirmance of the adverse final order of the trial judge which is the basis of this Petition was entered on June 30, 2000, and is unreported. That Opinion is reproduced as Appendix A marked as pages A-1 through A-3.

The Supreme Court of Alabama denied Sullivan's application for rehearing without written opinion in an Order entered on September 1, 2000. That Order is unreported and is reproduced as Appendix B.

The Order of the trial judge of the Circuit Court of Baldwin County, Alabama dated December 16, 1997, granting Mazak Corporation's (hereinafter referred to as "Mazak") motion for partial summary judgment on Sullivan's claim for damages for Mazak's alleged violation of the marking requirement of 19 U.S.C. § 1304(a) is entered on the trial court's case action summary sheet and is reproduced as Appendix C.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Alabama was entered on June 30, 2000. The Order denying Sullivan's application for rehearing was entered on September 1, 2000.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

Sullivan filed in the Supreme Court of Alabama a motion to stay issuance of the certificate of judgment. On October 11, 2000, that motion was denied. That Order is reproduced as Appendix D.

THE STATUTE INVOLVED

Title III, Part I, Section 304(a), Tariff Act of 1930, Pub. L. 71-361, Chapter 497, 46 Stat. 590, 687, as amended by the Customs Administrative Act of 1938, Pub. L. 75-721, Chapter 679, Section 3, 52 Stat. 1077, 19 U.S.C. § 1304(a), provides:

> "(a) Marking of articles. – Except as hereinafter provided, every article of foreign origin (or its container, as provided in subsection (b) hereof) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such a manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. The Secretary of the Treasury may by regulations –"

In the 1938 amendment Congress also added subdivisions (1) – (3) to amended Section 304(a) and added clauses (A) – (J)[1] to subdivision (3) as exceptions from the marking requirement. Those subdivisions and clauses are not material to the question presented for review herein. 19 U.S.C. § 1304 is reproduced as Appendix E marked as pages E-1 through E-10.

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[1] Section 304(a) of the Tariff Act of 1930 as amended in 1938 was amended in the Customs Simplification Act of 1953, Pub. L. 83-243, Chapter 397, Section 4(c), 67 Stat. 507, 509, by amending Section 304(a)(3) by adding clause (K) thereto. The 1938 amendment of Section 304(a) plus the 1953 amendment thereof is codified verbatim as the current 19 U.S.C. § 1304(a).

STATEMENT OF THE CASE

This civil action was commenced by Sullivan Machine & Tool Company filing a complaint on February 28, 1991, in the Circuit Court of Baldwin County, Alabama against Mazak Corporation, Mazak Sales & Service, Inc., John Lampi and Bob Eichelman (hereinafter all referred to as "Mazak" unless otherwise specifically stated). (C.1-8).[2]

On August 16, 1991, Mazak filed an answer to the complaint. (C.9-12).

On September 6, 1991, Mazak filed an amended answer to the complaint and a counterclaim. (C.13-25).

On February 24, 1992, Plaintiff filed a first amended complaint to reflect that the true name of the Plaintiff named in the original complaint is "Charles Sullivan d/b/a Sullivan Machine and Tool Company" (hereinafter referred to as "Sullivan"). (C.26).

Trial of the case commenced on March 17, 1993, and ended on March 24, 1993, when the jury returned a verdict against Sullivan on all claims made in his complaint, and in favor of Mazak on its breach of contract counterclaim, and assessed Mazak's damages in the sum of $267,882.80. (C.711).

On August 23, 1993, Sullivan timely filed notice of appeal from the final judgment entered against him. (C.1768).

On April 13, 1994, Sullivan filed a notice of filing a Rule 60(b) A.R.Civ.P. motion, as allowed by an attached Order from the Alabama Supreme Court (C.835-837), and

---

[2] Rule 28(e), Alabama Rules of Appellate Procedure, provides how references must be made to the record on appeal. If reference is made to a page in the clerk's record, the reference must be preceded by the letter "C." If reference is made to a page in the reporter's transcript, the reference must be preceded by the letter "R."

simultaneously filed therewith a Rule 60(b)(6) motion for relief from Mazak's judgment. (C.838-883).

On May 9, 1994, the trial judge granted Sullivan's 60(b)(6) motion and ordered the civil action reinstated on the trial docket. (C.833-834).

On June 17, 1994, Mazak filed notice of appeal from the Order granting Sullivan's 60(b)(6) motion. (C.1769).

On March 10, 1995, the Supreme Court of Alabama entered an Order that; (1) Sullivan's appeal from the judgment in favor of Mazak was dismissed as moot; (2) Mazak's appeal from the Order granting Sullivan's 60(b)(6) motion was dismissed; and (3) Mazak's petition for writ of mandamus to the trial judge was denied. *Sullivan v. Mazak*, 658 So. 2d 438 (Ala. 1995).

On March 4, 1996, Joseph J. Boswell filed his appearance as attorney of record for Sullivan after the death of Sullivan's original attorney. (C.1771).

On June 27, 1996, Sullivan filed a motion for leave to file a sixth amended complaint adding new theories of relief (C.951-953) and conditionally filed therewith the Sixth Amended Complaint (C.954-989). On July 16, 1996, that motion was granted. (C.1772).

At that point in time the following pertinent allegations were alleged in Sullivan's Sixth Amended Complaint:

SULLIVAN'S SIXTH AMENDED COMPLAINT
THE FACTS (C.955).

* * *

"8. On April 26, 1990 Sullivan received a request for a quotation from Taylor-Wharton of price and delivery for annual needs, July, 1990 through June, 1991, for a family of flange parts. The first purchase order targeted August 22, 1990 as an approximate delivery date. Taylor-Wharton extended that delivery date to September, 1990 to allow Sullivan time to acquire a

machine center with production capacity sufficient to produce the family of flange parts required by Taylor-Wharton.

9. Sullivan sought bids or quotes from manufacturers of the type of machine center Sullivan needed to produce the family of flange parts as required by Taylor-Wharton.

10. On July 11, 1990 Mazak employee Lampi made a call on Sullivan at his place of business in Foley, Alabama. Sullivan made inquires of Lampi regarding the machine center he needed for the manufacture of the family of flange parts required by Taylor-Wharton. Mazak, by and through its agent, servant or employee Lampi, represented to Sullivan that Mazak could manufacture the needed machine center. From July 11, 1990 through July 20, 1990 Lampi continued to solicit an order for Mazak from Sullivan to supply the machine center needed by Sullivan to manufacture the family of flange parts required by Taylor-Wharton under Sullivan's then existing contract with Taylor-Wharton."

* * *

"13. Prior to Sullivan executing the purchase order contract with Mazak, Sullivan expressly and specifically told Lampi on more than one occasion that he only purchased machinery which was manufactured in the United States and it was a condition of his purchase of the needed machine center from any manufacturer that it be manufactured in the United States.

14. On August 21, 1990 Lampi secured a purchase order from Sullivan for the purchase of a vertical machine center identified as Mazak AJV-25/405 with 25 HP 50 Taper Spindle and

Mazatrol M-32 CNC Control equipped as follows:

A. Turnkey for Part No. BC01-2C12 (Flange) to consist of, but not necessarily limited to, the following: Programming; Fixturing; Cutting Tools (3 sets minimum); Drawings; Etc.; as required to produce acceptable engineering parts within an estimated cycle time of 5.7 minutes at 85% efficiency.

B. Sullivan Machine & Tool would like to bid on the special tooling to be sub-contracted by Mazak.

C. Purchase Price: $157,000.

D. Scheduled Delivery Date: September 14, 1990.

E. Production Start Date: September 17, 1990.

F. F.O.B.: Atlanta, GA.

In addition to the terms and conditions expressly stated in the written purchase order, the following additional terms and conditions were included in the purchase order contract:

A. The new machine center would be manufactured in the United States;

B. Mazak would provide Sullivan with the results of Mazak's time study and pilot run of the production cycle time of the flange part per unit of production;

C. Mazak's personnel would provide the engineering expertise for design and manufacture of the machine center with a cycle time of 5.7 minutes for the flange part for which the machine center was being purchased to manufacture";

* * *

"19. On September 14, 1990, Mazak failed to deliver the machine center to Sullivan as

required in the purchase order contract. The scheduled delivery date was rescheduled for October 10, 1990, to accommodate Mazak."

* * *

"22. Mazak failed to deliver the machine center to Sullivan by the rescheduled delivery date of October 10, 1990."

* * *

"26. On November 2, 1990 the machine center arrived at Sullivan's business location in Foley, Alabama."

* * *

"30. On November 12, 1990, Mazak employee Greg Burnett arrived and made attempts to operate the machine center and to produce the flange part. Burnett stated that he was attempting to 'marry the programs', that the 'programming was in four parts' and he was attempting to 'put them together' to make the machine center produce the flange part in the manner represented and contracted for by Mazak."

* * *

"32. On November 27, 1990 Sullivan was in default in providing flange parts under his contract with Taylor-Wharton. Sullivan was in dire need of the machine center to perform his contract with Taylor-Wharton. Mazak through its agents, servants and employees then informed Sullivan for the first time that the machine center could not be made to operate with a cycle time of 5.7 minutes as required and called for in the purchase order contract. Mazak then required Sullivan on November 27, 1990 to sign an addendum to the purchase order contract changing the production cycle time requirement from 5.7 minutes per unit to 15

minutes per unit, plus or minus 5%. Eichelman represented that if Sullivan would sign the addendum Mazak employees would stay at Sullivan's shop as long as necessary to achieve the modified cycle time of 15 minutes per unit, plus or minus 5%, and have the machine center operating at 85% efficiency."

* * *

"38. Mazak never achieved successful production of the flange part within the purchase order contract cycle time of 5.7 minutes or the revised cycle time of 15 minutes per unit plus or minus 5%, and the machine center has never operated at 85% efficiency.

39. Mazak breached the terms of its purchase order contract with Sullivan and abandoned its efforts to complete performance of the contract."

* * *

"42. Subsequent to September 14, 1993, Sullivan learned for the first time that the manufacturer's decals and markings on the machine center delivered to Sullivan which stated or implied that the machine center had been manufactured in the United States were false and the machine center had in fact been manufactured in Japan and imported by Mazak into the United States." (C.955-962).

* * *

FOURTH CAUSE OF ACTION FRAUDULENT MISREPRESENTATION AND SUPPRESSION[3] (C.973).

"66. Sullivan hereby realleges and incor-porates the averments contained in Paragraphs 1 through 42 above as if again fully set out herein.

67. Mazak through its agents, servants or employees made the following misrepresentation of material fact to Sullivan, to-wit:

Mazak placed or caused to be placed Mazak's identification and decal markings on the machine center which stated or implied that the machine center was manufactured by Mazak in the United States when the machine center had in fact been manufactured in Japan and imported by Mazak into the United States.

68. Mazak's misrepresentation of material fact as alleged in Paragraph 67 above constituted fraud as defined in *Ala. Code*, § 6-5-101, in the following:

A. The information disclosed on the identification and decal markings was a misrepresentation made willfully to deceive with intent to induce Sullivan to act thereon and to alter his position to his damage and detriment in the following joint and separate ways and for the following joint and separate purposes, to-wit:

I. To purchase the machine center from Mazak.

II. To deprive Sullivan of his legal right to contract with another manufacturer to make the machine center in accordance with his requirements and specifications.

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[3] Claim for damages for Mazak's alleged violation of 19 U.S.C. § 1304(a) is also made in other causes of action.

III. To deny and deprive Sullivan of his legal right to know that the machine center was not manufactured in the United States but was manufactured in Japan and imported by Mazak into the United States, in violation of 19 U.S.C. § 1304(a).

69. Mazak through its agents, servants or employees suppressed and failed to inform Sullivan of the following material facts, to-wit:

A. That the machine center had been manufactured in Japan and imported into the United States;

B. That Mazak had changed or altered the manufacturer's identification and decal markings on the machine center which were placed or located thereon when the machine center was imported by Mazak into the United States and placed or caused to be placed thereon Mazak's identification and decal markings stating or implying that the machine center was manufactured by Mazak in the United States.

70. Mazak was under a duty to communicate to Sullivan the suppressed material facts alleged in Paragraph 69 above and Mazak's suppression of those material facts were fraudulent suppressions and constituted fraud as defined in *Ala. Code,* 6-5-102, in the following joint and separate ways:

A. The material facts were willfully or wantonly suppressed with intent to deceive and defraud Sullivan to induce him to alter and change his position to his damage and detriment in the following joint and separate ways and for the following joint and separate purposes, to-wit:

I. To purchase the machine center from Mazak.

II. To deprive Sullivan of his legal right to contract with another manufacturer to make the

machine center in accordance with his requirements and specifications.

III. To deny and deprive Sullivan of his legal right to know that the machine center was not manufactured in the United States but was manufactured in Japan and imported by Mazak into the United States, in violation of 19 U.S.C. § 1304(a)." (C.973-976).

On October 28, 1997, Mazak filed a motion for partial summary judgment on Sullivan's claim based on Mazak's alleged violation of 19 U.S.C. § 1304(a). (C.1254-1264). On December 16, 1997, that motion was granted. (C.1775).

The jury was struck for retrial of the case on September 14, 1998. At that time the only Defendants remaining in the civil action were Mazak Corporation and Bob Eichelman. (R.65). The case was tried on September 14-18, 1998. (C.1779). Before the case was submitted to the jury Sullivan dismissed Bob Eichelman as a Defendant. During the trial judge's oral charge he informed the jury that Mazak was the only remaining Defendant. (R.954).

On September 18, 1998, the jury returned a verdict against Sullivan on all claims in his complaint, and in favor of Mazak on its quasi-contract (unjust enrichment) counterclaim, assessing Mazak's damages in the sum of $250,234.12. (C.135 & C.1758). Final judgments were entered on that date in accordance with the jury verdicts. (C.1780).

Sullivan appealed to the Supreme Court of Alabama. (C.1782).

In Sullivan's appellant's brief he presented several issues for review.[4] The first issue presented for review was:

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[4] A copy of the first issue presented in the "Statement of Issues Presented for Review" in Sullivan's appellant's brief is reproduced as Appendix F.

"1. Did the trial judge err in granting Defendant Mazak Corporation's (Mazak) motion for summary judgment (in effect motion to dismiss for failure to state a claim upon which relief can be granted) on Plaintiff Charles W. Sullivan d/b/a Sullivan Machine & Tool Company's (Sullivan) claims for damages based on Mazak's alleged violation of 19 U.S.C. § 1304(a)? (See Argument I and cases cited therein.)"

SUMMARY OF PERTINENT TRIAL TESTIMONY OF CHARLES SULLIVAN

Sullivan contacted machine center vendors who might be able to supply the type of machine center he needed. His first contact was with Cincinnati Milacron. His second contact was with Okuma.[5] He supplied drawings to each of those vendors and asked them to provide a bid proposal for a machine center to produce the master flange. Each of those vendors submitted bid proposals. (R.416).

Before Sullivan made a decision to purchase a Cincinnati Milacron or an Okuma machine center, he was contacted by telephone by John Lampi (Lampi), a sales representative for Mazak. Lampi asked Sullivan if he had any current needs for machine tools. Sullivan told him to come to the office. (R.418-419). Lampi then went to Sullivan's office. Sullivan showed him the drawing of the master flange to be produced on the new machine center he was looking for. Lampi represented that Mazak produced the fastest machine centers in the nation. Lampi said Mazak had a very modern plant in Florence, Kentucky, and if Sullivan bought a Mazak machine center, it

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[5] Okuma is a Japanese owned machine tool manufacturing company. The Okuma machines were manufactured in South Carolina. (R.417-418).

would be manufactured in Kentucky. (R.421-422). Mrs. Sullivan was present during parts of that initial conversation between Sullivan and Lampi. At that time, Mrs. Sullivan expressly asked Lampi where the machine center would be manufactured, and made him well aware of the fact that any machine center which Sullivan bought must be manufactured in the United States. (R.422-423).

Commencing on Line 11 of Page 435 of the Reporter's Transcript, Sullivan testified:

> "Q. Now, for the record, before we move on to some other things, I want to ask you did you rely on the representation or promise – and promise of Mr. Lampi in his first meeting with you that any machine center that you might buy from Mazak would be manufactured in the United States?
>
> A. We agreed to that.
>
> Q. Did you rely on that?
>
> A. Yes, I did rely on that.
>
> Q. If Mr. Lampi had told you at that time that any machine you might buy from Mazak would not have been manufactured in the United States, would you at that point, have proceeded any further with negotiations?
>
> A. I would not have, no." (R.435).

SUMMARY OF PERTINENT TRIAL TESTIMONY OF JOSEPHINE SULLIVAN

Josephine Sullivan (Mrs. Sullivan) had been married to Sullivan for twenty-two years. She took care of all the administrative duties of the business. (R.720-721).

Mrs. Sullivan met Lampi for the first time in their office on July 11, 1990. (R.723). Lampi introduced himself and gave them literature about Mazak. (R.724). Commencing on Line 10 of Page 724 of the Reporter's Transcript, Mrs. Sullivan testified:

"----------I asked him if the machine was made in the United States. He stated that it was made in Kentucky in Mazak's new facility there. And I told him then, I said, you know, we didn't want a machining center that was not made in the U.S. And he assured us that this one was; that he was – or the brochure of the machines that he had, that they were made in the United States.

Q. Were you aware of any just general – just general policy that you and your husband had about buying products that were made in the United States?

A. Yes. We were trying to – every piece of equipment in the shop that we were buying then and for future purchases and all we were going to try to get U.S. made equipment.

Q. And what about other things?

A. Other things, I have always been encouraged by my parents and everyone else to buy American-made products. My father retired from Goodyear. He supported this policy, and I have since. If I can buy American made goods, then I try to.

Q. And what is your reason for that policy? Is it because you hate Japan or Mexico or Taiwan?

A. No. It's –

* * *

THE WITNESS: Well, my dad always taught me, you know, you buy locally, you're supporting the people that are there. You buy American, you're making American jobs. I've worked for so many plants in the past, and I have seen women lose their jobs going overseas to –

* * *

THE WITNESS: But I just feel like we need to keep all the jobs in America that we can." (R.724-726).

Mrs. Sullivan was then referred to Sullivan's Exhibits 48 and 49 which she identified as photographs she had taken. (R.735-736). Commencing on Line 7 of Page 736 of the Reporter's Transcript, Mrs. Sullivan testified:

"Q. And what do these photographs depict?

A. This is on the corner of the Mazak machining center stating "Mazak Quality Center," and it gives the manufacturer's number, the date that it was manufactured, Mazak Corporation, Florence, Kentucky, USA. This other one is just explaining the electrical equipment. This is also a plate on the Mazak machining center.

Q. Is that on the exterior of it?

A. Yes, it is.

Q. Is the other one on the exterior of it?

A. Yes. It says, "Manufactured in the USA by a member of National Machine Tool Builders Association." (R.736).

In September 1993, Mrs. Sullivan commenced making inquiries about where the machine center had actually been manufactured. (R.737). Commencing on Line 21 of Page 737 of the Reporter's Transcript, Mrs. Sullivan testified:

"Q. And who did you make that inquiry to?

A. The U.S. Customs Department.

Q. Where?

A. In Virginia.

Q. Okay. Did you speak to somebody at Customs about that?

A. Yes, I did." (R.737-738).

* * *

"Q. After that conversation with Mr. Fritz, did you do anything further with Mr. Fritz at Customs?

A. I made photographs of the plates there that were on the machine. I sent him the serial number. There's several pieces of information that he asked for. I sent all of that to him by Federal Express." (R.738).

* * *

"Q. What, if anything, did you learn as a result of that investigation?

A. That the machine that was delivered to Sullivan Machine & Tool Company was brought into the United States from Japan. The label "Made in Japan" had been removed and the label "Made In The USA" or "Manufactured In The USA" had been placed on the machine in Kentucky, shipped to Atlanta.

Q. And when y'all got it, where was it shipped from?

A. Atlanta." (R.739).

MAZAK'S INTERROGATORY RESPONSES READ TO THE JURY

Commencing on Line 3 of Page 274 of the Reporter's Transcript, Mazak's interrogatory responses were read to the jury:

"Interrogatory Number 2: 'Was the machine center manufactured in a country other than the United States and imported into the United States?'

Answer. 'Yes.'

Interrogatory Number 3: 'If your answer to Interrogatory Number 2 above is in the affirmative state:

(A) the manufacturing country of origin.'

Answer. 'Japan.'

(B) 'The identity of the foreign manufacturer.'

Answer. 'Yamazaki Mazak Seiko Corporation.'

(C) 'The foreign manufacturer's serial number of the machine center.'

Answer: 'Serial Number 81663.'[6]

(D) 'The port in the United States through which the machine center was imported.'

Answer: 'Upon information and belief, Baltimore.'

* * *

(G) 'The name and location of the Mazak facility to which the machine center was shipped after import and before it was delivered to Sullivan.'

Answer: 'Mazak Plant and Technical Center at Florence, Kentucky, and technical center at College Park, Atlanta, Georgia.' " (R.274-275).

PERTINENT TRIAL TESTIMONY OF JOHN LAMPI

Commencing on Line 23 of Page 291 of the Reporter's Transcript, Lampi testified:

"Q. And while you were down here in July, did you have occasion to call Sullivan Machine & Tool Company?

A. Yes, sir." (R.291).

---

[6] The Mazak serial number of the machine center delivered to Sullivan is 81663, as disclosed on Sullivan's Exhibit 19, which is Mazak's Installation Form, which document is reproduced in pertinent part as Appendix G.

* * *

"Q. And at that time did Mr. Sullivan indicate to you that he was – may be, he was or may be in the market to buy a product that – of the kind that your company sold?

A. That's correct." (R.293).

* * *

"Q. And did you, in fact, go over there that same day and talk to Mr. Sullivan?

A. Yes, sir." (R.293).

* * *

"Q. Did you – and did you have occasion on that initial visit to his office to meet his wife, Ms. Josephine Sullivan, also?

A. I did.

Q. Okay. And did you sit down in the office and talk during that initial visit with Mr. Charles Sullivan and his wife, Josephine Sullivan?

A. Yes." (R.293).

Thereafter, commencing on Line 7 of Page 303 of the Reporter's Transcript, Lampi testified:

"Q. You also told him when you talked to him that the machine – that if y'all sold the machine, whatever machine y'all sold to him, had to be made in the United States, didn't you?

A. Well, that's a – well, to back up. When talking to Mr. Sullivan, I explained to him that the machines that we had were manufactured in Kentucky. And *he was rather adamant that he did not want a Japanese made machine.* And I *assured him* that these were made in Kentucky. Yes, sir, he did say that he wanted an American made machine." (Emphasis added). (R.303).

REASONS THE WRIT SHOULD BE GRANTED

The trial judge granted Mazak's motion for partial summary judgment on Sullivan's claim for damages based on Mazak's alleged violation of the marking requirement mandated in 19 U.S.C. § 1304(a) on the ground that 19 U.S.C. § 1304 is a criminal statute and "the court is of the opinion that the statute in question is not the type that creates an implied civil remedy." (See App. C). The Supreme Court of Alabama affirmed that Order with "No Opinion," thereby tacitly adopting the trial judge's construction of 19 U.S.C. § 1304(a). The Supreme Court of Alabama thereby decided an important question of federal law that has not been, but for the reasons argued below, should be settled by this Court.

The title of the Tariff Act of 1922, Pub. L. 61-5, Chapter 356, 42 Stat. 858, was "An Act To provide revenue, to regulate commerce with foreign countries, *to encourage the industries of the United States,* and for other purposes." (Emphasis added).

The title of the Tariff Act of 1930, Pub. L. 71-361, Chapter 497, 46 Stat. 590, is "An Act To provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, *to protect American labor,* and for other purposes." (Emphasis added).

In the Tariff Act of 1930, Title III, Part I, Section 304,[7] subsections 304(a) and 304(d), 46 Stat. 590, 687, 688,

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[7] Subsection 304(e) of amended Section 304, 46 Stat. 590, 688, provides that amended Section 304 of the Tariff Act of 1930 would take effect sixty days after enactment of the Act on June 17, 1930. Title IV, Part VI, Section 651(a)(1), 46 Stat. 590, 762, provides that the Tariff Act of 1922 was repealed, except the repeal of sections 304 and 482 (relating to marking of imported articles and to certified invoices, respectively) did not take effect until sixty days after enactment of the Act on June 17, 1930. Title IV, Part VI, Section 653, 46 Stat. 590, 763, provides that except as otherwise provided, the Act took effect on the day following its enactment on June 17, 1930.

Congress amended Sections 304(a) and 304(b) of the Tariff Act of 1922. Section 304(a) as amended provided:

> "(a) Manner of Marking – Every article imported into the United States, and its immediate container, and the package in which such article is imported, shall be marked, stamped, branded, or labeled, in legible English words, in a conspicuous place, in such a manner as to indicate the country of origin of such article, in accordance with such regulations as the Secretary of the Treasury may prescribe. Such marking, stamping, branding, or labeling shall be as nearly indelible and permanent as the nature of the article will permit. The Secretary of, the Treasury may, by regulations prescribed hereunder, except any article from the requirement of marking, stamping, branding, or labeling if he is satisfied that such article is incapable of being marked, stamped, branded, or labeled or can not be marked, stamped, branded, or labeled without injury, or except at an expense economically prohibitive of the importation, or that the marking, stamping, branding, or labeling of the immediate container of such article will reasonably indicate the country of origin of such article."

Section 304(d), amending Section 304(b), provided:

> "(d) PENALTIES. – If any person shall, with intent to conceal the information given thereby or contained therein, deface, destroy, remove, alter, cover, obscure, or obliterate any mark, stamp, brand, or label required under the provision of this Act, he shall, upon conviction,

be fined not more than $5000 or imprisoned not more than one year, or both."[8]

In the Customs Administrative Act of 1938 entitled "An Act To amend certain administrative provisions of the Tariff Act of 1930, and for other purposes," Chapter 679, Section 3, 52 Stat. 1077, Congress amended Section 304(a) of Title III, Part I, Tariff Act of 1930, to read in pertinent part as follows:

"(a) Marking of Articles – Except as hereinafter provided, every article of foreign origin (or its container, as provided in subsection (b) hereof) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such a manner as *to indicate to an ultimate purchaser in the United States* the English name of the country of origin of the article. The Secretary of the Treasury may by regulations –" (Emphasis added).

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[8] In Section 304(d) Congress amended the wording of Section 304(b) of the Tariff Act of 1922, but the criminal penalties for violating the marking requirements of the Act remained the same as originally provided in the Tariff Act of 1909, Pub. L. 36-5, Chapter 6, Section 8, 36 Stat. 11, 85, until the penalties subsection of Section 304 for violating the marking requirements of the Act was amended in the Omnibus Trade and Competitiveness Act of 1988, (by that time having been redesignated as Section 304(h)-19 U.S.C. § 1304(h)) in Title I, Subtitle H, Part I, Section 1907(l), 102 Stat. 1107, 1314, by increasing the penalties for the same acts proscribed in Section 304(d) of the Tariff Act of 1930 to a fine of not more than $100,000, or imprisonment for not more than 1 year, or both, for the first conviction, and a fine of not more than $250,000, or imprisonment for not more than 1 year, or both, for the second and each subsequent conviction. 19 U.S.C. § 1304(h) as amended in 1988 is now 19 U.S.C. § 1304(l). See App. E-9-10.

Title III, Part I, Section 304(a), Tariff Act of 1930, as amended in 1938, continues to be codified verbatim at 19 U.S.C. § 1304(a). See App. E-1.[9]

THE MAZAK MACHINE CENTER WHICH WAS MANUFACTURED IN JAPAN, IMPORTED INTO THE UNITED STATES, AND SOLD TO SULLIVAN, IS AN *ARTICLE* WITHIN THE MEANING OF 19 U.S.C. § 1304(a).

In *Aluminum Co. of America v. United States*, 16 Ct. Cust. 112 (1928) that court stated in pertinent parts:

> "It is agreed that the merchandise involved in the two protests covered by this appeal, one on behalf of each of the respective appellants, includes two hydraulic machines, one known as an extrusion press and the other a piercing press, each of which is composed of a large number of parts. One machine when set up is said to cover from 10,000 to 15,000 and the other some 5,000 square feet. . . . Each machine was built in France. . . . The two machines were imported, boxed in 38 separate cases. . . . "
> 16 Ct. Cust. at 113
>
> * * *
>
> "After being assembled and set up in the importers' factory the machines were examined by a customs examiner and found not to be in any way marked so as to show the country of origin. The examiner advisorily appraised and classified them as machines not specially provided for under paragraph 372 of the Tariff Act of 1922, reported to the collector that they were not marked as required by section 304(a) of the

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[9] Each time Title III, Part I, Section 304(a), Tariff Act of 1930, as amended in 1938, is hereafter cited in this Petition, is cited only as 19 U.S.C. § 1304(a).

act. . . . It is agreed that these 38 cases contained all the substantial parts of the two machines, and that the machines were imported in what is called a 'knocked-down' condition."

16 Ct. Cust. at 113-114

* * *

"Section 304(a) provides –

That every article imported into the United States, which is capable of being marked, stamped, branded, or labeled, without injury, at the time of its manufacture or production, shall be marked, stamped, branded, or labeled, in legible English words, in a conspicuous place that shall not be covered or obscured by any subsequent attachments or arrangements, so as to indicate the country of origin. . . . "

16 Ct. Cust. at 114

* * *

"Another contention is that the machines are not articles within the meaning of section 304(a), regarding which it is said –

Probably Congress never intended the word 'article' as used in section 304(a) to refer to an elaborate system of machinery built to order under specifications and erected in an American mill or factory.

We can only infer what Congress intended from the language it used. The word 'article' as commonly understood is of wide and comprehensive meaning. Paragraph 372 refers to a great variety of machines, some of which are ponderous, indicating that size is not necessarily controlling as to what is a machine – an article. The machines here are regarded as entireties for the purpose of classification under that paragraph, and for the purposes of this case we can

not say that they are not articles within the meaning of section 304(a)."
16 Ct. Cust. at 115-116[10]

SULLIVAN WAS THE *ULTIMATE PURCHASER* OF THE MAZAK MACHINE CENTER.

In *In Re the Matter of: Property Seized from ICS Cutting Tools, Inc.*, 163 F.R.D. 292 (D.C. Wis., 1995), that court stated:

> "19 U.S.C. § 1304 provides that, unless excepted, every article imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article or its container will permit, in such a manner as to indicate to the ultimate purchaser the name of the country of origin of the article in English. As defined in 19 C.F.R. § 134.1(d), the 'ultimate purchaser' is generally the last person in the U.S. who will receive the article in the form which it was imported. . . . "
> 163 F.R.D. at 296

JUDICIAL CONSTRUCTION OF THE PURPOSE OF THE MARKING REQUIREMENT IN THE TARIFF ACTS FROM 1890 UNTIL THE 1938 ENACTMENT OF 19 U.S.C. § 1304(a).

In *United States v. Ury*, 106 F.2d 28 (2nd Cir. 1939) that court stated the purpose of the marking requirement contained in the Tariff Act of 1890, Chapter 1244, Section 6, 26 Stat. 567, 613; the Tariff Act of 1909, Pub. L. 61-5, Chapter 6, Section 7, 36 Stat. 11, 85; the Tariff Act of 1922, Pub. L. 67-318, Chapter 356, Title III, Part I, Section 304(a), 42 Stat. 858, 936; and the Tariff Act of 1930, Pub. L. 71-361, Chapter 497, Title III, Part I, Section 304(a), 46 Stat. 590, 687, 688:

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[10] To the same effect see *Gera Mills v. United States*, 15 Ct. Cust. 316 (1927).

"The requirement that goods at the time of importation bear marks indicating the country of origin appeared first in the Tariff Act of 1890 (26 Stat. 613) and has been included in all later tariff acts. The purpose was to apprise the *public* of the foreign origin and thus to confer an advantage on domestic producers of competing goods. Congress was aware that many consumers prefer merchandise produced in this country –" (Emphasis added).

106 F.2d at 29

JUDICIAL CONSTRUCTION OF THE PURPOSE OF THE MARKING REQUIREMENT IN 19 U.S.C. § 1304(a)

In *United States v. Mersky*, 361 U.S. 431 (1960) this Court first stated the history of that criminal case which resulted in the case being before the Court:

"The Congress has provided in the Tariff Act of 1930, 46 Stat. 590, as amended, that imported articles be marked to indicate to an ultimate purchaser in the United States the English name of the country of origin. 19 U.S.C. § 1304. Pursuant to the Act, the Secretary of the Treasury adopted implementing regulations. This case tests the application of these provisions to the importation of 10 violins from the Soviet Zone of Germany. Appellees were charged with removing the labels from the violins with intent to conceal from the ultimate purchasers in the United States the identity of the violins' country of origin. The District Court dismissed the information, holding that the changing of the labels did not violate the Act because the applicable regulation appeared to require the Soviet Zone marking only for tariff purposes rather than to apprise the ultimate purchasers of the place of origin. . . . "

361 U.S. at 432-433

In *Mersky*, this Court thereafter stated, in pertinent part:

> "We agree with the District Court. It appears that T. D. 53210, unlike T. D. 51527, is aimed at the collection of duties rather than *the protection of the ultimate purchaser* in the United States. . . . It contains no reference to the requirement of § 1304 that the article be marked in a 'conspicuous place,' 'legibly, indelibly, and permanently,' so that *an 'ultimate purchaser in the United States' would be on notice. . . .* " (Emphasis added).
>
> 361 U.S. at 440

THE FOUR-FACTORED *CORT* TEST

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court found the criminal statute in question did not create an implied private right of action, and enunciated a four-factor test to determine whether Congress created an implicit private right of action in a criminal statute:

> "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' (citation omitted) – that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? (Citation omitted.) Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? (Citations omitted.) And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer

a cause of action based solely on federal law? (Citations omitted.)"

422 U.S. at 78

In *Wilder v. Virginia Hosp. Assn.*, 496 U.S. 498 (1990), this Court stated:

"This is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute. See Cort v. Ash, 422 U.S. 66 (1975). In implied right of action cases, we employ the four-factored Cort test to determine 'whether Congress intended to create the private remedy asserted' for the violation of statutory rights. (Citations omitted). . . . "

496 U.S. at 509 n. 9

In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), Cannon sued the University of Chicago alleging she was a victim of sex discrimination, in violation of Title IX of the United States Code (20 U.S.C. § 1681 et seq.). The District Court dismissed her complaint, concluding no private right of action could be inferred because it was a criminal statute which did not expressly provide a private right of action. The Seventh Circuit Court of Appeals affirmed. This Court granted certiorari and reversed, stating:

"The language in these statutes – which expressly identifies the *class* Congress intended to benefit – contrasts sharply with statutory language customarily found in criminal statutes, such as that construed in Cort, supra, and other laws enacted for the protection of the general public. . . . " (Emphasis added).

441 U.S. at 690

In *Cannon*, after finding the criminal statute in question expressly identified the *class* of persons Congress intended to benefit, as distinguished from criminal statutes enacted for the protection of the general public, this

Court found the first factor of the *Cort* test favored implication of a private right of action (441 U.S. at 693). Then, in addressing the second factor of the *Cort* test, this Court stated:

> "Second, the Cort analysis requires consideration of legislative history. We must recognize, however, that the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question. Therefore, in situations such as the present one 'in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such cause of action would be controlling.' Cort, 422 U.S., at 82. . . . "
>
> 441 U.S. at 694

There is no provision in 19 U.S.C. § 1304, nor in any other section of Title III, nor in any other Title in the Tariff Act of 1930, which expressly creates or denies a private right of action in favor of ultimate purchasers who would not have become ultimate purchasers of foreign-made products if the products had been marked with the manufacturer's country of origin so as to enable the ultimate purchasers to inspect the country of origin marking prior to deciding to purchase those products, as mandated in 19 U.S.C. § 1304(a).

THE ANALYSIS IN THIS CIVIL ACTION OF EACH OF THE FOUR FACTORS OF THE *CORT* TEST

THE FIRST FACTOR OF THE *CORT* TEST

19 U.S.C. § 1304(a) clearly grants a statutory right to the identifiable class of ultimate purchasers of foreign-made products imported into the United States to know the manufacturer's country of origin by inspection of the country of origin marking before making a decision to

purchase those products. Therefore, the first factor of the *Cort* test favors implication of a private right of action.

THE SECOND FACTOR OF THE *CORT* TEST

As a result of 19 U.S.C. § 1304(a) clearly granting the identifiable class of ultimate purchasers of foreign-made products the *right to know* the manufacturer's country of origin by inspection of the country of origin marking before making a decision to purchase those products, it is not necessary to go further in the analysis of the second factor of the *Cort* test. *Cannon*, 441 U.S. at 694.

THE THIRD FACTOR OF THE *CORT* TEST

The third factor of the *Cort* test also favors implication of a private right of action, because the creation of an implied private right of action is consistent with the underlying purposes of the legislative scheme of Congress in enacting the Tariff Act of 1930. One of the express purposes stated in the title of the Tariff Act of 1930 is *to protect American labor*. When prospective ultimate purchasers of foreign-made products decide not to purchase those products after inspection of the country of origin marking, their decisions not to purchase those products have a tendency to protect American labor by preventing the loss of jobs of workers employed by American manufacturers of products sold in competition with the products of foreign manufacturers.

THE FOURTH FACTOR OF THE *CORT* TEST

The fourth factor of the *Cort* test also favors implication of a private right of action. Congressional creation of an implied private right of action in favor of ultimate purchasers who would not have become ultimate purchasers of imported foreign-made products if the products had been marked for their inspection of the country of origin marking before making a decision to purchase

those products, as mandated in 19 U.S.C. § 1304(a), does not constitute the creation of a cause of action which is traditionally relegated to state law, in an area basically the concern of the States.

CONCLUSION

For the reasons stated and argued in this Petition, the answer to the question presented for review, when applying the four-factored *Cort* test to 19 U.S.C. § 1304(a), is, or probably is, in the affirmative. This Petition should be granted in order for this Honorable Court to fully consider and answer the question presented for review.

Respectfully submitted,

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APPENDIX A

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of ***Southern Reporter***. Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((9334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in ***Southern Reporter***.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1999-2000

1980235

Charles Sullivan d/b/a Sullivan Machine & Tool Company

v.

Mazak Corporation

Appeal from Baldwin Circuit Court
(CV-91-140)

(Released June 30, 2000)

ENGLAND, Justice.

AFFIRMED. NO OPINION.

See Rule 53 (a) (1) and (a) (2) (B), Ala. R. App. P.

Hooper, C.J., and Maddox, Houston, Cook, Lyons, and Brown, JJ., concur.

See and Johnstone, JJ., concur in part and dissent in part.

SEE, Justice (concurring in part and dissenting in part).

I dissent from the no-opinion affirmance of the summary judgment in favor of the defendant Mazak Corporation on its unjust-enrichment counterclaim against the plaintiff Charles Sullivan d/b/a Sullivan Machine & Tool Company. Otherwise, I concur in the affirmance of the trial court's judgment.

A party cannot recover on a claim of unjust enrichment where there is an enforceable express contract between the parties concerning the same subject matter on which the unjust-enrichment claim rests. See *Kennedy v. Polar-BEK & Baker Wildwood Partnership*, 682 So. 2d 443, 447 (Ala. 1996). See also *Barry Mogul & Assocs., Inc. v. Terrestris Dev. Co.*, 267 Ill. App. 3d 742, 750-51, 643 N.E.2d 245, 251-52, 205 Ill. Dec. 294, 300-01 (1994), stating:

> "It is well established, as a general rule, that a plaintiff cannot pursue a quasi-contractual claim where there is an enforceable express contract between the parties. . . . 'Difficulties arise with quasi-contractual claims when there is an express contract between the parties. The general rule is that no quasi-contractual claim can arise when a contract exists between the parties concerning the same subject matter on which the quasi-contractual claim rests. The reason for this rule is not difficult to discern. When parties enter into a contract they assume certain risks with an expectation of a return. Sometimes, their expectations are not realized, but they discover that under the contract they have assumed the risk of having those expectations defeated.

> As a result, they have no remedy under the contract for restoring their expectations. In desperation, they turn to quasi-contract for recovery. This the law will not allow. Quasi-contract is not a means for shifting a risk one has assumed under contract.' "

(Citations omitted.) I conclude that an enforceable express contract exists between Sullivan and Mazak concerning the same subject matter on which Mazak's unjust-enrichment counterclaim rests. The dispute between Sullivan and Mazak concerns one of the terms of that contract. Therefore, I dissent from the affirmance of the trial court's judgment insofar as it relates to Mazak's unjust-enrichment claim.

JOHNSTONE, Justice (concurring in part and dissenting in part).

I dissent from affirming the summary judgment against the plaintiff Sullivan on his deceit claim. For the reasons stated by Justice See in his special writing, I also dissent from affirming the summary judgment in favor of the defendant Mazak on its unjust enrichment counterclaim against Sullivan. I concur in all other holdings.

APPENDIX B

IN THE SUPREME COURT OF ALABAMA
September 1, 2000

198025

Charles Sullivan d/b/a Sullivan Machine & Tool Company v. Mazak Corporation (Baldwin Cir.Ct.No.: CV-91-140)

ORDER

The application for rehearing filed in this cause on July 14, 2000, is overruled. No opinion written on rehearing.

ENGLAND, J. " Maddox, Houston, Cook, Lyons, and Brown, JJ., concur;

Hooper, C.J., and See and Johnstone, JJ., dissent.

APPENDIX C

CVL0852

CV 91 000140.00
JUDGE: Charles C. Partin

ALABAMA JUDICIAL DATA CENTER
CASE ACTION SUMMARY CONTINUATION
CIRCUIT CIVIL

IN THE CIRCUIT COURT OF BALDWIN COUNTY
CHARLES & JOSEPHINE SULLIVAN DBA SULLIVAN MACHINE VS MAZAK CORP

FILED: 02/28/91 TYPE: DAMAGES TYPE TRIAL: JURY TRACK:

* * *

12/16/97 Defendant's motion for partial summary judgment on civil claim for violation criminal statute be, and the same is hereby granted because the court is of the opinion that the statute in question is not the type that creates an implied civil remedy. Motion for to reconsider is granted in part. The plaintiffs are ordered to update their information protected by the orders dated August 8, 1995, September 27, 1995, and November 6, 1995. In all other respects, the motion to reconsider is denied.

/s/ Charles C. Partin
Judge

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

October 11, 2000

1980235

Charles Sullivan d/b/a Sullivan Machine & Tool Company v. Mazak Corporation (Baldwin Cir.Ct.No.: CV-91-140)

ORDER

The appellant having filed a motion to stay the issuance of the certificate of judgment, and the same having been duly submitted to the Court,

IT IS ORDERED that the motion to stay the issuance of the certificate of judgment is denied.

Hooper, C. J., and Maddox, Houston, Cook, See, Lyons, Brown, Johnstone, and England, JJ., concur.

APPENDIX E

19 U.S.C. § 1304. Marking of imported articles and containers

(a) Marking of articles. Except as hereinafter provided, every article of foreign origin (or its container, as provided in subsection (b) hereof) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. The Secretary of the Treasury may by regulations –

(1) Determine the character of words and phrases or abbreviations thereof which shall be acceptable as indicating the country of origin and prescribe any reasonable method of marking, whether by printing, stenciling, stamping, branding, labeling, or by any other reasonable method, and a conspicuous place on the article (or container) where the marking shall appear;

(2) Require the addition of any other words or symbols which may be appropriate to prevent deception or mistake as to the origin of the article or as to the origin of any other article with which such imported article is usually combined subsequent to importation but before delivery to an ultimate purchaser; and

(3) Authorize the exception of any article from the requirements of marking if –

(A) Such article is incapable of being marked;

(B) Such article cannot be marked prior to shipment to the United States without injury;

(C) Such article cannot be marked prior to shipment to the United States, except at an expense economically prohibitive of its importation;

(D) The marking of a container of such article will reasonably indicate the origin of such article;

(E) Such article is a crude substance;

(F) Such article is imported for use by the importer and not intended for sale in its imported or any other form;

(G) Such article is to be processed in the United States by the importer or for his account otherwise than for the purpose of concealing the origin of such article and in such manner that any mark contemplated by this section would necessarily be obliterated, destroyed, or permanently concealed;

(H) An ultimate purchaser, by reason of the character of such article or by reason of the circumstances of its importation, must necessarily know the country of origin of such article even though it is not marked to indicate its origin;

(I) Such article was produced more than twenty years prior to its importation into the United States;

(J) Such article is of a class or kind with respect to which the Secretary of the Treasury has given notice by publication in the weekly Treasury Decisions within two years after July 1, 1937, that articles of such class or kind were imported in substantial quantities during the five-year period immediately preceding January 1, 1937, and were not required during such period to be marked to indicate their origin: Provided, That this subdivision (J)

shall not apply after September 1, 1938, to sawed lumber and timbers, telephone, trolley, electric-light, and telegraph poles of wood, and bundles of shingles; but the President is authorized to suspend the effectiveness of this proviso if he finds such action required to carry out any trade agreement entered into under the authority of the Act of June 12, 1934 (U. S. C., 1934 edition, title 19, secs. 1351-1354) [19 USCS §§ 1351 et seq.], as extended; or

(K) Such article cannot be marked after importation except at any expense which is economically prohibitive, and the failure to mark the article before importation was not due to any purpose of the importer, producer, seller, or shipper to avoid compliance with this section.

(b) Marking of containers. Whenever an article is excepted under subdivision (3) of subsection (a) of this section from the requirements of marking, the immediate container, if any, of such article, or such other container or containers of such article as may be prescribed by the Secretary of the Treasury, shall be marked in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of such article, subject to all provisions of this section, including the same exceptions as are applicable to articles under subdivision (3) of subsection (a). If articles are excepted from marking requirements under clause (F), (G), or (H) of subdivision (3) of subsection (a) of this section, their usual containers shall not be subject to the marking requirements of this section. Usual containers in use as such at the time of importation shall in no case be required to be marked to show the country of their own origin.

(c) Marking of certain pipe and fittings.

(1) Except as provided in paragraph (2), no exception may be made under subsection (a)(3) with respect to pipes of iron, steel, or stainless steel, to pipe fittings of steel, stainless steel, chrome-moly steel, or cast and malleable iron each of which shall be marked with the English name of the country of origin by means of die stamping, cast-in-mold lettering, etching, engraving, or continuous paint stenciling.

(2) If, because of the nature of an article, it is technically or commercially infeasible to mark it by one of the five methods specified in paragraph (1), the article may be marked by an equally permanent method of marking or, in the case of small diameter pipe, tube, and fittings, by tagging the containers or bundles.

(d) Marking of compressed gas cylinders. No exception may be made under subsection (a)(3) with respect to compressed gas cylinders designed to be used for the transport and storage of compressed gases whether or not certified prior to exportation to have been made in accordance with the safety requirements of sections 178.36 through 178.68 of title 49, Code of Federal Regulations, each of which shall be marked with the English name of the country of origin by means of die stamping, molding, etching, raised lettering, or an equally permanent method of marking.

(e) Marking of certain manhole rings or frames, covers, and assemblies thereof. No exception may be made under subsection (a)(3) with respect to manhole rings or frames, covers, and assemblies thereof each of which shall be marked on the top surface with the English name of the

country of origin by means of die stamping, cast-in-mold lettering, etching, engraving, or an equally permanent method of marking.

(f) Marking of certain coffee and tea products. The marking requirements of subsections (a) and (b) shall not apply to articles described in subheadings 0901.21, 0901.22, 0902.10, 0902.20, 0902.30, 0902.40, 2101.10, and 2101.20 of the Harmonized Tariff Schedule of the United States, as in effect on January 1, 1995.

(g) Marking of spices. The marking requirements of subsections (a) and (b) shall not apply to articles provided for under subheadings 0904.11, 0904.12, 0904.20, 0905.00, 0906.10, 0906.20, 0907.00, 0908.10, 0908.20, 0908.30, 0909.10, 0909.20, 0909.30, 0909.40, 0909.50, 0910.10, 0910.20, 0910.30, 0910.40, 0910.50, 0910.91, 0910.99, 1106.20, 1207.40, 1207.50, 1207.91, 1404.90, and 3302.10, and items classifiable in categories 0712.90.60, 0712.90.8080, 1209.91.2000, 1211.90.2000, 1211.90.8040, 1211.90.8050, 1211.90.8090, 2006.00.3000, 2918.13.2000, 3203.00.8000, 3301.90.1010, 3301.90.1020, and 3301.90.1050 of the Harmonized Tariff Schedule of the United States, as in effect on January 1, 1995.

(h) Marking of certain silk products. The marking requirements of subsections (a) and (b) shall not apply either to –

(1) articles provided for in subheading 6214.10.10 of the Harmonized Tariff Schedule of the United States, as in effect on January 1, 1997; or

(2) articles provided for in heading 5007 of the Harmonized Tariff Schedule of the United States as in effect on January 1, 1997.

(i) Additional duties for failure to mark. If at the time of importation any article (or its container, as provided in subsection (b) hereof) is not marked in accordance with the requirements of this section, and if such article is not exported or destroyed or the article (or its container, as provided in subsection (b) hereof) marked after importation in accordance with the requirements of this section (such exportation, destruction, or marking to be accomplished under customs supervision prior to the liquidation of the entry covering the article, and to be allowed whether or not the article has remained in continuous customs custody), there shall be levied, collected, and paid upon such article a duty of 10 per centum ad valorem, which shall be deemed to have accrued at the time of importation, shall not be construed to be penal, and shall not be remitted wholly or in part nor shall payment thereof be avoidable for any cause. Such duty shall be levied, collected, and paid in addition to any other duty imposed by law and whether or not the article is exempt from the payment of ordinary customs duties. The compensation and expenses of customs officers and employees assigned to supervise the exportation, destruction, or marking to exempt articles from the application of the duty provided for in this subsection shall be reimbursed to the Government by the importer.

(j) Delivery withheld until marked. No imported article held in customs custody for inspection, examination, or appraisement shall be delivered until such article and

every other article of the importation (or their containers), whether or not released from customs custody, shall have been marked in accordance with the requirements of this section or until the amount of duty estimated to be payable under subsection (i) of this section has been deposited. Nothing in this section shall be construed as excepting any article (or its container) from the particular requirements of marking provided for in any other provision of law.

(k) Treatment of goods of NAFTA country.

(1) Application of section. In applying this section to an article that qualifies as a good of a NAFTA country (as defined in section 2(4) of the North American Free Trade Agreement Implementation Act [19 USCS @ 3301(4)]) under the regulations issued by the Secretary to implement Annex 311 of the North American Free Trade Agreement –

(A) the exemption under subsection (a)(3)(H) shall be applied by substituting "reasonably know" for "necessarily know";

(B) the Secretary shall exempt the good from the requirements for marking under subsection (a) if the good –

(i) is an original work of art, or

(ii) is provided for under subheading 6904.10, heading 8541, or heading 8542 of the Harmonized Tariff Schedule of the United States; and

(C) subsection (b) does not apply to the usual container of any good described in subsection (a)(3)(E) or (I) or subparagraph (B)(i) or (ii) of this paragraph.

(2) Petition rights of NAFTA exporters and producers regarding marking determinations

(A) Definitions For purposes of this paragraph:

(i) The term "adverse marking decision" means a determination by the Customs Service which an exporter or producer of merchandise believes to be contrary to Annex 311 of the North American Free Trade Agreement.

(ii) A person may not be treated as the exporter or producer of merchandise regarding which an adverse marking decision was made unless such person –

(I) if claiming to be the exporter, is located in a NAFTA country and is required to maintain records in that country regarding exportations to NAFTA countries; or

(II) if claiming to be the producer, grows, mines, harvests, fishes, traps, hunts, manufactures, processes, or assembles such merchandise in a NAFTA country.

(B) Intervention or petition regarding adverse marking decisions. If the Customs Service makes an adverse marking decision regarding any merchandise, the Customs Service shall, upon written request by the exporter or producer of the merchandise, provide to the exporter or producer a statement of the basis for the decision. If the exporter or producer believes that the decision is not correct, it may intervene in any protest proceeding initiated by the importer of the merchandise. If the importer does not file a protest with regard to the

decision, the exporter or producer may file a petition with the Customs Service setting forth –

(i) a description of the merchandise; and

(ii) the basis for its claim that the merchandise should be marked as a good of a NAFTA country.

(C) Effect of determination regarding decision. If, after receipt and consideration of a petition filed by an exporter or producer under subparagraph (B), the Customs Service determines that the adverse marking decision –

(i) is not correct, the Customs Service shall notify the petitioner of the determination and all merchandise entered, or withdrawn from warehouse for consumption, more than 30 days after the date that notice of the determination under this clause is published in the weekly Custom Bulletin shall be marked in conformity with the determination; or

(ii) is correct, the Customs Service shall notify the petitioner that the petition is denied.

(D) Judicial review. For purposes of judicial review, the denial of a petition under subparagraph (C)(ii) shall be treated as if it were a denial of a petition of an interested party under section 516 [19 USCS @ 1516] regarding an issue arising under any of the preceding provisions of this section.

(1) Penalties. Any person who, with intent to conceal the information given thereby or contained therein, defaces, destroys, removes, alters, covers, obscures, or obliterates any mark required under the provisions of this Act shall –

(1) upon conviction for the first violation of this subsection, be fined not more than $100,000, or imprisoned for not more than 1 year, or both; and

(2) upon conviction for the second or any subsequent violation of this subsection, be fined not more than $250,000, or imprisoned for not more than 1 year, or both.

APPENDIX F

IN THE SUPREME COURT OF ALABAMA

SUPREME COURT APPEAL NO: 1980235

CHARLES W. SULLIVAN D/B/A SULLIVAN MACHINE & TOOL CO.

PLAINTIFF-APPELLANT

VS.

MAZAK CORPORATION

DEFENDANT - APPELLEE

APPEALED FROM THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

BRIEF OF APPELLANT

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* * *

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented for review in this appeal are:

1. Did the trial judge err in granting Defendant Mazak Corporation's (Mazak) motion for summary judgment (in effect motion to dismiss for failure to state a claim upon which relief can be granted) on Plaintiff Charles W. Sullivan d/b/a Sullivan Machine & Tool Company's (Sullivan) claims for damages based on Mazak's alleged violation of 19 U.S.C. 1304(a)? (See Argument I and cases cited therein).

* * *

APPENDIX G

INSTALLATION FORM

Customer Name Sullivan Mach & Tool

Telephone No. (405) 943-7382

Contact Charles Sullivan

Distributor Direct

Address 19525 Keller Rd

City

State

Zip Code

Model AJV 25/405

S/N 81663

Start Date 11/7/90

Finish Date 11/9/90

* * *

When the above items are checked, the machine installation is complete. Before signing please read the "end-user warranty/service agreement on the reverse side of this form. It contains important information relating to warranty exclusions and limitations of remedies. Customer acknowledges receipt of copy of installation form.

Customer Signature /s/ Charles Sullivan Date 11/9/90

Service Engineer /s/ Kevin Stephenson Date 11/9/90

Comments:

MACHINE FILE

Plaintiffs Exhibit 19

Supreme Court, U.S.
FILED
NOV 21 2000
CLERK

(2)

No. 00-647

In The

Supreme Court of the United States

CHARLES SULLIVAN D/B/A
SULLIVAN MACHINE & TOOL COMPANY,

Petitioner,

vs.

MAZAK CORPORATION,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Summary of the Argument

The petition herein should be denied for at least two reasons. First, the relief sought, (i.e. an implied civil remedy under the Tariff Act of 1930, 19 U.S.C. § 1304), violates the exclusive province of Congress to "lay and collect Taxes, Duties, Imposts and Excises . . ." and that such Duties, Imposts and Excises "shall be uniform throughout the United States" as set forth in the United States Constitution, Article I, § 8, Cl. 1. Second, the Tariff Act of 1930, 19 U.S.C. § 1304 which carries criminal sanctions does not meet the four requirements set forth in *Cort v. Ash*, 422 U.S. 66 (1975) for a private civil remedy to be allowed.

Petitioner's Claim For Relief Violates The United States Constitution, Article I, § 8, Cl. 1

Article I, § 8, Cl. 1 of the United States Constitution provides that,

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;"

The Tariff Act of 1930, Pub. L. 71-361, Chapter 497, 46 Stat. 590, ("The Act") is "An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, to protect American

labor, and for other purposes." Clearly, "The Act" is a direct delegation of authority to Congress under Article I, § 8, Cl. 1. Congress, and Congress alone, has the authority to levy and collect, Taxes, Duties, Imposts and Excises on goods imported into the United States. However, Sullivan in his petition seeks to advance a claim for recovery of an implied private civil remedy under "The Act" which is in the nature of a "Duty" or "Impost." Such relief, is improper under the Constitution.[1]

Even if Sullivan were correct, and Mazak strongly contends that he is not, that Mazak violated the marking requirements of "The Act," as found in § 1304, there is a tremendous need for uniform implementation, administration and enforcement of "The Act" and the regulations promulgated thereunder throughout the United States.[2] The need for such uniformity was recognized by Congress, in that, the Secretary of the Treasury was vested

---

[1] Additionally, we have not found a single case that has allowed a private civil remedy under § 1304 of the Tariff Act of 1930 in the 70 years since its adoption.

[2] Sullivan presented evidence at trial, which was met with countervailing evidence, that Mazak did import a machine center from Japan into the United States and then after its arrival in this country, changed the markings on the machine to indicate that it was "Made in the USA." (See Petition herein pp. 12-18). Mazak's evidence at trial was that several components of the machine were manufactured in Japan, properly marked with their country of origin, imported into the United States, transported to its Kentucky plant, and there assembled along with other parts manufactured in the United States, with the machine center then marked "Made in the USA." (R857-R866). There has been no finding by the Secretary of the Treasury, the Customs Service, any government agency or any court of law that Mazak violated § 1304.

with the responsibility to adopt, administer and enforce by regulations the provisions of "The Act." 19 U.S.C. § 1304.

To allow a private civil remedy under "The Act," for violations of its marking requirements would create a "hodge-podge" of different results. State courts and juries would be called upon to decide what constitutes a sufficient marking of the country of origin. For example, they would be asked to decide where the marking should be placed on the imported good or article, the proper language to employ in the marking, the size of the lettering of the marking, and other similar questions. The results would be disparate and uniformity of application and enforcement of "The Act" forever lost. Allowing a civil remedy would be particularly egregious and wrong in this case where there has been no charge or finding of criminal wrong doing under "The Act" by Mazak.

For the foregoing reasons, the civil remedy sought by Sullivan constitutes a clear violation of Article I, § 8, Cl. 1, of the Constitution and his Petition for Writ of Certiorari is due to be denied.

There Is No Right To a Civil Remedy Because "The Act" Does Not Meet the Four Part *Cort. v. Ash* Test

For an implied right to a civil recovery under a federal criminal statute, the Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975), set forth the following four point test that must be met:

1. There must be a clearly articulated federal right in the plaintiff;

2. The legislative history of the act must suggest a Congressional intent to vest a federal right to damage for violation of the statute;

3. A private civil remedy must further the statutory purpose;

4. The cause of action is not one traditionally relegated to state law in an area primarily of state concern.

Sullivan's claim that 19 U.S.C. § 1304 gives an implied civil remedy fails to meet each of the four points of the *Cort v. Ash* Test.

There Is No Clearly Articulated Right To a Civil Remedy

An unbiased reading of 19 U.S.C. § 1304 makes clear that Congress, mindful of its Constitutional mandate to "lay and collect Taxes, Duties, Imposts and Excises," had no intention to grant a private civil remedy for its violation. In fact, § 1304(h) expressly provides its own civil remedy in the nature of liquidated damages in the amount of an additional 10% duty for a marking violation. This civil damage is in addition to the criminal penalties set forth in § 1304 (k). In the law of contracts, if an express contract exists, a court or a jury is forbidden to construct an implied contract between the parties. Similarly, since Congress set forth a civil remedy for violation of § 1304; an implied civil remedy cannot exist.

Additionally, Congress provided extensive civil remedies in 19 U.S.C. § 1592 when by fraud, gross negligence or negligence the United States is deprived of the lawful duty owed on imported goods. These are remedies

given to the United States and not private litigants like Sullivan. The United States Court of International Trade so held in *Dennison Manufacturing Company v. United States Department of The Treasury*, 678 F. Supp. 984 (CIT 1988). There, an importer, Dennison, brought a pre-emptive action against the government challenging an adverse customs determination. The Court of Trade dismissed the complaint. The court held that "The Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (1982) . . . provides for civil penalties for fraud, negligence, and gross negligence in importing merchandise. Actions to collect penalties under 19 U.S.C. § 1592 ***may only be instituted . . . by the United States.***" [emphasis added] *Id.* at 896. So even if "The Act" were violated, the United States, not Sullivan, would be the only proper party to seek civil redress.

For the sake of uniformity of administration and enforcement, Congress chose not to allow a private civil remedy for violation of "The Act." Therefore, since Sullivan has no clearly articulated right to an implied civil remedy under § 1304, the first element of the *Cort* Test fails.

The Legislative History Does Not Suggest An Intent To Vest A Federal Right To Damages For Violation of § 1304

The legislative history of the Tariff Act of 1930 and specifically § 1304, its amendments and progeny, does not suggest that Congress ever intended to vest a civil cause of action for damages in a private individual such as Sullivan. Therefore, the second element of the *Cort* Test fails.

A Private Civil Cause of Action Will Not Further The Statutory Purpose

19 U.S.C. § 1304 specifically provides that its provisions are to be carried out and enforced by the Secretary of the Treasury. The Secretary is specifically given authority to adopt appropriate regulations for that purpose. As discussed elsewhere, the creation of a private, civil cause of action for violation of § 1304 can only create a "hodge-podge" of inconsistent enforcement, interpretations and results. In fact, the Secretary through the United States Customs Service has promulgated extensive regulations to uniformly implement and enforce § 1304. Importers can expect the same marking rules to apply whether they are importing merchandise in California, Hawaii or Alaska or through ports along the Gulf Coast or East Coast. The same Customs Service is promulgating and applying the same rules and regulations for marking imported merchandise all across the country. The statutory purpose requires uniformity of implementation, administration and enforcement of § 1304 and the entire Tariff Act of 1930 throughout the country. That purpose cannot be furthered by allowing private civil suits for damages.

Therefore, since Sullivan's claim for an implied civil remedy under § 1304 does not further its statutory purpose, the third element of the *Cort* Test must fail.

Sullivan's Claims Were Ones Traditionally Relegated to State Law

There is no dispute that the Sullivan claims for fraud, deceit and breach of contract are claims with which state

courts and juries are very familiar. Sullivan set forth in his complaint extensive allegations of fraud, deceit and breach of contract based on the alleged improper marking of the machine center by Mazak. As stated in his Petition For Writ of Certiorari, at pages 12 through 18, Sullivan offered extensive testimony at trial on the alleged improper marking, from Charles Sullivan, Josephine Sullivan and John Lampi in support of his state law claims.

At the conclusion of the evidentiary phase of the trial, the Court charged the jury on Sullivan's deceit claim concerning the marking issue as follows:

> "And in this case, Charles Sullivan in his deceit claim has alleged that the Defendant, Mazak Corporation, manufactured the machine center in Japan and imported it into this country and removed the, plaque or certificate on the side of the machine center saying it was manufactured in the United States.
>
> And I instruct you that you may only return a verdict in favor of the Plaintiff against the Defendant, Mazak Corporation, on the deceit claim if you are reasonably satisfied from the evidence that the entire machine was manufactured in Japan and then imported in its entirety to the United States and then had the, the plaque or the sign or the decal removed and another one substituted;
>
> Secondly, that Mazak did so with the knowledge of the falsity of its action or that it was so recklessly done that it amounted to knowledge of making the representation that it knew to be false.

> If, on the other hand, if you're reasonably satisfied from the evidence that major component parts of the machine center were manufactured in Japan and the parts were shipped to the United States and parts of the machine were manufactured in the United States and it was assembled in the United States, then the plaintiff would not be entitled to recover for deceit."

R-971 through R-972.

The essence of Sullivan's complaint was for recovery against Mazak for "garden variety" fraud, deceit and breach of contract claims that state court judges and juries handle every day. After hearing all the evidence about alleged false marking, changing decals, etc., the jury rejected Sullivan's claims against Mazak and returned a verdict in favor of Mazak and against Sullivan on its unjust enrichment claim. The jury's verdict was affirmed by the Alabama Supreme Court.

Sullivan has had a full and fair evidentiary hearing on the issue of the alleged false marking of the machine center by Mazak. The issues presented by his complaint are ones which are traditionally and commonly relegated to state courts and state law. Therefore, the fourth element of the *Cort* Test also fails.

CONCLUSION

Sullivan brings this petition because he is unhappy with the fact finding and decision of a duly constituted jury of his peers, affirmed by the Alabama Supreme Court, who ruled against him on his fraud, deceit and

breach of contract claims. The petition does not seek to advance any legitimate claim or right afforded under the United States Constitution or federal law. The relief Sullivan seeks for an implied civil remedy under 19 U.S.C. § 1304 would violate Article I, § 8, Cl. 1., of the Constitution, if allowed. The relief Sullivan claims also fails to satisfy the four point test of *Cort v. Ash*, 422 U.S. 66 (1975).

WHEREFORE, the jury has determined the facts, rendered its verdict and been affirmed; Sullivan's Petition for Writ of Certiorari is due to be denied.

Respectfully submitted,

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